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7
8 **UNITED STATES BANKRUPTCY COURT**
9
10 **DISTRICT OF NEVADA**

11 * * *

12 IN RE:

13 CARL LACKEY,

14 Debtor.

15 MARK. E. SMITH, an individual,

16 Plaintiff,

17 Vs.

18 CARL LACKEY, an individual,

19 Defendant.

20 Case No. 3:23-bk-50403-hlb

21 Chapter 7

22 Adv. Pro. 23-05011-hlb

23 Hearing Date: 9/27/2023

24 Hearing Time: 10:00 a.m.

25 **POINTS AND AUTHORITIES
IN REPLY TO RESPONSE BY
DEFENDANT CARL LACKEY
TO MOTION BY PLAINTIFF
MARK E. SMITH
PURSUANT TO 28 U.S.C. §§
1452(b), 1334(c)(2) AND
1334(c)(1), 11 U.S.C. §
362(d)(1) AND FEDERAL
RULE OF BANKRUPTCY
PROCEDURE 9027(d) TO
ABSTAIN AND REMAND
AND FOR RELIEF FROM
STAY**

26 **TO THE COURT AND ALL PARTIES IN INTEREST:**

1 MARK E. SMITH (“Smith”), by the undersigned counsel, and hereby files
2 the following Reply to September 6, 2023 Response/Opposition to the motion to
3 abstain and remand pursuant to 28 U.S.C. §§ 1452(b), 1334(c)(2) and 1334(c)(1)
4 and Fed. R. Bank. P.9027(d) and for relief from the Automatic Stay under 11
5 U.S.C. § 362(d)(1) filed by Defendant CARL LACKEY (“Lackey”).

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 Lackey argues that if Smith intends to claim any insurance funds available
8 under the insurance policies provided by Mr. Lackey's insurer, Lackey does not
9 oppose a remand. However, Lackey indicates that his non-opposition is
10 contingent on Smith representing that he is limiting his recovery to available
11 insurance proceeds. Smith still has claims against Mr. Lackey's estate, which
12 are otherwise recoverable only under the bankruptcy process. However, Smith
13 recognizes that under the relief requested in the Motion, his ability to recover on
14 remand would be limited to the proceeds of any applicable insurance policy.
15

16 Lackey argues that Mr. Smith's proposal is to forgo and refrain from
17 pursuing Lackey for any damages not insured, but this is not the case. Smith is
18 seeking abstention, remand, and relief from the stay to pursue the proceeds of
19 the applicable insurance policies, but this pursuit does not constitute a waiver of
20 the claim Smith has against the estate of Mr. Lackey within the bankruptcy case.
21

22 Lackey's opposition never reaches the primary issues of law before the
23 Court, i.e. whether this adversary proceeding meets all the criteria for mandatory
24 abstention pursuant to 28 U.S.C. § 1334(c)(2) or permissive abstention under §
25 1334(c)(1), or remand for equitable grounds under 28 U.S.C. § 1452(b). Lackey
26 offers no reason based on these standards to keep the adversary proceeding in
27 this Court when it was commenced in state court and is governed exclusively by
28 state law.

1 Lackey argues that his primary worry is that Smith might be trying, without
2 explicitly saying so, to secure a state court judgment that he could argue is
3 non-dischargeable under 11 U.S.C. § 523(a)(6). Dischargability is a separate
4 issue from that of recovering proceeds of an insurance policy, which is the relief
5 sought in the motion. However, on September 11, 2023, Smith filed a Motion to
6 Join the adversary proceeding in Case No. 23-05014-hlb along with creditor
7 Carolyn Stark objecting to discharge on separate grounds, i.e. (a) provision of a
8 false statement related to Lackey's initial Petition submissions where Lackey
9 omitted two significant-value assets that belong to the estate (11 U.S.C. Section
10 727(a)(4)(A)), and (b) for hiding those two assets during and after the submission
11 of his initial Petition Schedules (11 U.S.C. Section 727(a)(2)(B)).

12 Smith concedes that by filing proofs of claim, he has consented to the
13 jurisdiction of this Court to collect all or a portion of a debt under *Smith v.*
14 *Adelson*, 389 B.R. 902, 916 (D. Nev. 2008); but, that is not the issue here. As
15 argued in the underlying Motion, insurance policies are the property of a
16 bankruptcy estate. But, insurance **proceeds** derived from those policies are not
17 the estate's property. Smith should be free to pursue those proceeds
18 independent of this action because recovery against those policies has no effect
19 on the estate - and in the Motion, Smith seeks limited relief to do just that.

20 Lackey also argues that the criteria for punitive or non-dischargeable
21 damages under bankruptcy law vary notably from Nevada's benchmark for
22 punitive damages in NRS 42.005, and that the "implied" standard differs from
23 that under 11 USC § 523(a)(6). To be clear, Smith has a statutory right to punitive
24 damages under Nevada law under the applicable Anti-SLAPP statute, i.e. NRS
25 41.670(c). 11 USC § 523(a)(6), on the other hand, creates an exception to
26 discharge where there is "willful and malicious injury by the debtor to another
27
28

1 entity or to the property of another entity." The question of whether Smith is
2 entitled to punitive damages under his Nevada Law claim, and may recover as
3 much from the proceeds of any applicable insurance policy, is a separate issue
4 as to whether such damages are dischargeable. However, for purposes of the
5 motion, this issue is neither here nor there.

6 As described in the motion, Smith, seeks to continue the SLAPP-Back
7 action for which there is likely coverage under Lackey's applicable insurance
8 policies in Nevada State Court. The issues raised in the Reply, while related, do
9 not bear on the core question before the Court.

10 WHEREFORE, Smith respectfully moves that this Court abstain from
11 hearing this matter, remand this matter back to the State Court, and grant Smith
12 relief from the Automatic Stay under the provisions of 11 U.S.C. § 362(d)(1) such
13 that Smith may pursue the proceeds of any applicable insurance policy that may
14 cover his claims in Case No. 2023-cv-00052 in the Ninth Judicial District Court of
15 Nevada, in and for the County of Douglas, as described in the underlying Motion.

16
17
18 **DATED** this Sep 12, 2023

19 By: /s/ Luke Busby, Esq.
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1
2 **CERTIFICATE OF SERVICE**
3

4 I certify that on the date shown below, I caused service to be completed of a
5 true and correct copy of the foregoing REPLY TO RESPONSE TO MOTION BY
6 PLAINTIFF MARK E. SMITH PURSUANT TO 28 U.S.C. §§ 1452(b), 1334(c)(2) AND
7 1334(c)(1) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 9027(d) TO
8 ABSTAIN AND REMAND AND RELIEF FROM STAY by:

9 personally delivering;
10 delivery via Reno/Carson Messenger Service;
11 sending via Federal Express (or other overnight delivery service);
12 depositing for mailing in the U.S. mail, with sufficient postage affixed thereto;
13 or,
14 delivery via electronic means (fax, eflex, NEF, etc.) to:
15

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Sep 12, 2023